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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

## No. 581

LOREN R. GAJEWSKI and MERVIN A. GAJEWSKI,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## REPLY BRIEF OF THE PETITIONERS

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### ARGUMENT

The Respondent has, in its Brief in Opposition (p. 2) completely recast the second question presented for review by Petitioner. Respondent here has adopted the position taken by the court below and has completely ignored the constitutional question involved. The question appears one not previously decided by this court. The guarantee

of the Sixth Amendment that in all criminal prosecutions, the accused shall enjoy the right "to have compulsory process for obtaining witnesses in his favor" becomes meaningless, if after bringing the witnesses to court, the trial judge can in his discretion prevent them from being sworn and giving testimony. It is beyond belief that an important constitutional right such as this should be in any way qualified and subject to the whims of the trial judge, reviewable only on the basis of "abuse of discretion".

The vice of Respondent's argument is pointed up by the statement which appears at page 9 of its Brief in Opposition, where it was said: "this request was properly refused on the grounds that such evidence was immaterial and irrelevant and the point was not pressed." The Respondent here is discussing a claimed purpose of Petitioners' efforts to call the Deputy Clerk for the purpose of placing in evidence certain Interrogatories involved in collateral civil cases.* The point is that the trial judge had not reached the evidentiary stage of the proceeding whereby he could intelligently rule upon the materiality or relevancy of the Interrogatories. Because there was no opportunity to have them marked as exhibits and offered in evidence after having been identified by the Clerk, there is no offer of proof in the record by which any reviewing court could determine whether the trial court was correct in his determination of relevancy and materiality. In fact, from the record it does not even appear that the trial court so much as looked at the records before making his determination. However, had the Clerk been sworn, the Interrogatories identified and offered, at

*Respondent cites only one of the Petitioners' collateral civil cases in footnote 5, appearing on page 9. Another is: *Merrin Gajewski v. United States*, Civil No. 17586 (8th Cir. Nov. term, 1963).

this point the requirement of the Sixth Amendment would have been fulfilled and the evidentiary stage reached, at which point the trial judge could intelligently make his decision as to admissibility and the record for review would leave no doubt.

The speculative conclusions appearing in Respondent's third paragraph of page 9 is in no way borne out by the record. Because of the state of the record caused by the conduct of the trial judge, it is difficult to positively demonstrate the relevancy and materiality or make other evidentiary evaluations of the Interrogatories from collateral civil cases. The Petitioners believe that the Interrogatories would have destroyed the basis for the Government's net worth theory in the case and upon which the Petitioners were convicted under Count 3.

Nor is there any basis to speculate that the testimony of the United States Attorney could have aided the defense of the Petitioners only as to Count 1. Apart from the fact that he had been their attorney on previous occasions and had handled land transactions for them, he was a personal acquaintance and neighbor in a small rural county. He undoubtedly had considerable knowledge of their character and in all likelihood, personal knowledge of the family finances which were under fire in this case. Here again, the conduct of the trial judge sanctioned by the court below prevents a proper record from being before this Court. If he had permitted the prosecutor to be sworn, the questions to have been propounded, we would at least know why it was that Petitioners questioned him. Objections might have been sustained to the question, but in that event it would have been appropriate for Petitioners to have made an offer of proof, and there might have been additional records before this Court. Certainly there can be no requirement however that an

offer of proof must first be made before invoking rights under the Sixth Amendment to compel testimony for the defense.

Furthermore, if Petitioners had been allowed to question Mr. Garaas under oath, it is unlikely that the court below would have been compelled to go outside the record to accept as fact, the representations of the United States Attorney as to his former dealings with the Petitioners (See Respondent's Brief, p. 10, fn. 7.) Petitioners are now in a position of never having had an opportunity in court to dispute the claim of the United States Attorney that he really did not obtain anything, during his prior representation of them as attorney, which had prejudiced them in this prosecution.

At footnote 8, page 11 in its Brief, the Respondent deals with question number 4 presented for review by Petitioners. Contention that it is "crystal clear" that the confidential ASC records illegally obtained by the Government went only to Count 1 and not to Count 3, is incorrect. As a matter of fact, the ASC records complained of under question number 4 was the primary source of information upon which the Government witness based his opinion of the net worth of the family and his yearly increase. For instance, one of the confidential records required to be filed by wheat farmers under 7 U.S.C. 1373 is the "Report of Acreage". On this form, farmers supply to the Government information as to the number of acres of wheat grown on his farm. In this case, it became a comparatively simple matter for the Government to calculate the number of bushels of wheat grown upon such acreage and apply to that figure the market price of wheat to determine gross income. At page 35 of the Government's Brief in the Court below it was argued that computations such as described above

convincingly proved that Defendants had income and thus could not legally claim to be dependents. In part, it was this claim that led to their conviction under Count 3. The Government, at the trial, might have proved their ownership of land without the confidential ASC records, but they could not have proved that the land was income producing and thus argue that Petitioners had a false statement when claiming dependency upon their parents. During the trial the Government introduced 229 exhibits. Of that number, 58 were exhibits taken from the files and records of the McKenzie County ASC Office. Many, if not all, of those records were the type specifically described in 7 U.S.C. 1733, but their bulk prevents full discussion in either the Petition for Certiorari or this Reply. We think it is enough here to point out solely that these records did not go solely to the conviction under Count 1, but that they were also effectively used to convict the Petitioners under the Count 3.

If Certiorari is granted, Petitioners have indicated (Pet. 3) they would challenge the Constitution on legal sufficiency of the evidence to support the verdict. Throughout the Reply Brief the Respondent argues that the evidence is sufficient and that in effect for that reason Certiorari ought to be denied. Because of the complexity and volume of the evidence in this case, it is impossible in the space allowed to adequately meet this charge. We can only say here that the evidence to support any of the counts upon which the Petitioners were convicted is insufficient and Respondent is wrong in its assertions to the contrary.

Respectfully submitted,

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